

Before the
Federal Communications Commission
Washington, D.C. 20554

FILED/ACCEPTED
MAY 17 2007
Federal Communications Commission
Office of the Secretary

In the Matter of)

Amendment of Section 73.202(b)
Table of Allotments,
FM Broadcast Stations.

(Coal Run, Kentucky and Clinchco, Virginia))

MB Docket No. 04-319
RM-10984

To: Office of the Secretary
(Attention: Assistant Chief, Audio Division, Media Bureau)

OPPOSITION
TO PETITION FOR RECONSIDERATION

Dickenson County Broadcasting Corp. ("Dickenson"), licensee of WDIC-FM, Channel 221A, at Clinchco, Virginia, by its attorneys, hereby opposes the Petition for Reconsideration ("Petition") filed May 4, 2007, by East Kentucky Broadcasting Corporation ("East Kentucky"), licensee of Station WPKE-FM, Channel 276A, Coal Run, Kentucky. In the *Report and Order*, DA 07-1350, released March 20, 2007 [published April 4, 2007 in the Federal Register as 72 Fed. Reg. 16315] ("R&O"). The R&O correctly denied East Kentucky's proposal to substitute Channel 221C3 for Channel 276A at Coal Run, to modify Station WPKE-FM's license accordingly, and change the operating channel of WDIC-FM from 221A to 276A to accommodate East Kentucky.'

As shown herein, East Kentucky's proposal is not feasible because a terrain obstruction would require construction of a tower over 1,300 feet tall

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¹ On October 4, 2004, Dickenson showed why its license for WDIC-FM should not be modified as proposed in the Audio Division's *Notice of Proposed Rule Making and Order to Show Cause*, DA 04-2501, released August 12, 2004 ("**Show Cause Order**").

Procedural Defect Renders Petition Defective

As an initial matter, the Media Bureau need not temporize with the Petition since it must be stricken and given no consideration. East Kentucky specifically states that it filed its petition “pursuant to Section 1.106 of the Commission’s rules.” This is the section governing petitions for reconsideration of actions other than notice and comment rule making proceedings such as this one. However, Section 1.106² clearly provides: “For provisions governing reconsideration of Commission action in notice and comment rule making proceedings, see Sec. 1.429. This Sec. 1.106 does not govern reconsideration of such actions [emphasis added].” Filing under Section 1.106 has the effect of depriving Dickenson of the time necessary to prepare its opposition to the Petition. The time for opposing a petition filed under Section 1.106 is 10 days (plus 3 additional days if service of the petition is by mail), resulting in today’s deadline, May 17, 2007. Had East Kentucky filed under Section 1.429 of the Rules, the terminal date for filing an opposition would be 15 days after public notice of the Petition is given in the Federal Register. Thus, the time for filing an opposition has not yet begun running.³ Dickenson is prejudiced, therefore, because East Kentucky has had 45 days to develop its Petition, while Dickenson is relegated to a mere 10 days to prepare an opposition. On this basis, the Petition should be dismissed. However, should the

² Section 1.106(a)(1) provides: Petitions requesting reconsideration of a final Commission action will be acted on by the Commission. Petitions requesting reconsideration of other final actions taken pursuant to delegated authority will be acted on by the designated authority or referred by such authority to the Commission. A petition for reconsideration of an order designating a case for hearing will be entertained if, and insofar as, the petition relates to an adverse ruling with respect to petitioner’s participation in the proceeding. Petitions for reconsideration of other interlocutory actions will not be entertained. **(For provisions governing reconsideration of Commission action in notice and comment rule making proceedings, see Sec. 1.429. This Sec. 1.106 does not govern reconsideration of such actions.)** [Emphasis added].”

³ East Kentucky availed itself of the provisions of Section 1.429 in filing its Petition within 30 days of Federal Register publication on April 4, although the Audio Davison’s *R&O* was released March 20, 2007.

Audio Division treat the Petition under Section 1.429 petition and send it to the Federal Register for publication, Dickenson reserves the right to supplement this Opposition if necessary by the deadline established in Section 1.429(f) of the Rules. In an abundance of caution, however, DICKENSON herein addresses the merits of the Petition.

Substantive Defect in Proposal Must Result in Dismissal of the Petition

The Media Bureau denied East Kentucky's proposal on the following grounds:

Maximum Class C3 facilities are an effective radiated power of 25 kilowatts at a height above average terrain of 100 meters (328 feet). In this instance, a tower of approximately 50 meters (160 feet) above ground would result in a height above average terrain of 100 meters. Even assuming FAA clearance, it would be necessary to construct a tower of approximately 173 meters (570 feet) above ground to achieve a height above average terrain of 224 meters to overcome this terrain obstruction. Increasing the height above average terrain requires a reduction in effective radiated power in order to ensure that a station is not operating in excess of maximum permissible facilities. In this situation, it would be necessary to reduce effective radiated power to 5.1 kilowatts. This would be in contravention of Section 73.211(b)(2)(iv) of the rules which requires that the minimum effective radiated power for a Class C3 facility be not less than 6 kilowatts.

The Media Bureau found, in addition, that the two alternate transmitter sites suggested by East Kentucky were also technically defective due to terrain obstructions.⁴ East Kentucky suggested that these terrain obstructions could be overcome with a "1,000 foot tower." The Media Bureau found that such a tower would require FAA clearance and a reduction in effective radiated power to a level below the 6 kilowatt minimum for a Class C3 station.

East Kentucky argues that the Media Bureau doesn't understand its own rules. The Technical Report lists 125 existing Class C3 non-reserved band stations that operate with effective radiated powers below six kilowatts. The Technical Report indicates that "Many of these stations

⁴ The first alternate site is short-spaced to Station WZAQ, Channel 222A, Louisa, Kentucky, and Station WWJD, Channel 219C3, Pippa Passes, Kentucky, in contravention of Section 73.207 (b) of the rules. Using the 3 second terrain database, the Media Bureau found a major terrain obstruction located 4.9 kilometers (3.04 miles) from the proposed transmitter site. In regard to the second alternate site the Bureau's engineering study identified multiple terrain obstructions preventing the requisite line-of-site and 70dBu coverage of Coal Run.

were authorized as one-step upgrades with allocation points that required the use of an ERP less than 6 kW.” However, the Technical Report provides no instance where such a facility was authorized where there was terrain blockage to the community of license, and the allotment was made a result of a rule making proposal, as here. East Kentucky has cited no precedent where the Commission has specifically approved an allocation reference site which would require the station operating from that site to be below the minimum power level for the class of station sought. However, even assuming *arguendo*, that East Kentucky is right about the application of Section 73.211(a), the fact remains that East Kentucky’s proposal is technically infeasible. It really doesn’t matter what power level WPKE-FM operates with because the signal will be blocked from Coal Run. And, additional study of the terrain between the allocation site and Coal Run demonstrates that the obstruction is even worse than Dickenson originally reported.

Attached hereto are Technical Comments that demonstrate this. Dickenson’s technical consultant has examined a point on what is thought to be the city limit of Coal Run. Even with a tower 401.4 meters tall (1316.9 feet) this portion of Coal Run does not have line of sight coverage from the East Kentucky allocation reference even utilizing such a tall tower. The attached exhibit shows that no line of sight is available to this location in Coal Run. Therefore, there are portions in Coal Run that will not receive the requisite 70 dBμ line of sight signal from the East Kentucky allocation reference location. But still the lingering fact of a tower structure that is not feasible remains. The Technical Comments demonstrate that with the allocation reference site ground elevation of 548.6 meters (1800 feet), the tower height would have to be 401.4 meters above ground level. If the Audio Division has doubts about the feasibility of constructing a 173 meter (570 feet) tower in the middle of the Kentucky mountains, constructing a supporting structure 401.4 meters tall (1316.9 feet) is even less feasible.

The Technical Comments show that even a structure 401.1 meters tall does not clearly serve (without shadows) the city of Coal Run. As the Audio Division stated, “We will not allot a channel where a properly spaced site is technically infeasible. While we presume that the proposed site is technically feasible and available, that presumption is rebuttable.” *San Clemente, California*, 3 FCC Rcd 6728 (1988), *appeal denied sub nom. Mount Wilson FM Broadcasters, Inc., v. FCC*, 884 F.2d 1462 (D.C. Cir. 1989). Dickenson has rebutted the presumption. East Kentucky provides no additional analysis of the terrain in its Petition, relying instead on a critique of the Commission’s staffs reading ability. East Kentucky has not even attempted to show that it can actually construct a 1,316.9 foot high tower on top of a mountain. East Kentucky has not shown that it could obtain FAA clearance for the tower, or that such a tower could be constructed in mountainous terrain. In addition, East Kentucky has never addressed the requirements of the National Programmatic Agreement⁵ that dictate that the tower cannot be built if there are any historic or native American sites that might be adversely impacted. Since East Kentucky has failed to show that it can actually construct a 1,316.9 foot high tower at the reference site, its proposal must be denied.

The Audio Division must treat similarly situated applicants the same, as East Kentucky has observed in its Petition.⁶ In its letter⁷ dated December 18, 2003, dismissing Dickenson’s application (File No. BPH-20010502AAN) to upgrade Station WDIC-FM to Class C3, the Audio Division observed that a tower 1,000 feet high would be necessary. Dickenson having not submitted any information that would lead the Audio Division to believe that the proposed allotment reference site could feasibly be used for an operation which could cover the

⁵ See Report and Order, FCC 04-222, 19 FCC Rcd 10660 (2004).

⁶ *Garrett v. FCC*, 513 F.2d 1056, 1060 (D. C. Cir. 1975), citing *Melody Music, Inc. v. FCC*, 345 F.2d 730, 723-3 (D. C. Cir. 1965).

⁷ Copy attached.


community of license with a 70 dBu signal, the Audio Division dismissed the application. The Audio Division noted that it had no information suggesting that the FAA would approve a tower of sufficient height to clear the terrain obstruction. Neither has East Kentucky submitted any information suggesting that the **FAA** would approve a 1,316.9 foot tall tower. Consequently, the Audio Division must treat the East Kentucky proposal in the same manner as it treated the Dickenson proposal in 2003. It must dismiss the Petition.

WHEREFORE, in light of the foregoing, Dickenson requests the Audio Division to dismiss East Kentucky's Petition and terminate this proceeding without modifying Dickenson's license for WDIC-FM.

Respectfully submitted,

DICKENSON COUNTY
BROADCASTING CORP.

By: 

 Gary S. Smithwick
Its Attorney

Smithwick & Belendiuk, P.C.
5028 Wisconsin Avenue, NW
Suite 301
Washington, DC 20016

202-363-4560

May 17, 2007

**TECHNICAL COMMENTS
IN OPPOSITION TO
PETITION FOR RECONSIDERATION
OF THE COMMISSION ACTION
MB Docket No. 04-319**

These Technical Comments are in opposition to the Petition For Reconsideration filed by East Kentucky Broadcasting Corp. ("East Kentucky") regarding the Commission's Action in MB Docket No. 04-319. These comments are filed on behalf of Dickenson County Broadcasting Corp. ("Dickenson"), licensee of **WDIC-FM**, Clinchco, Virginia.

In the original Technical Comments filed by Dickenson, a major terrain obstruction was found between the East Kentucky allocation reference coordinate¹ and Coal Run, the city of license. This obstruction is located at 310.97 degrees at a distance of **10.57 KM**.

In the Report and Order denying the East Tennessee proposal, the Commission's Staff confirms that there is indeed a "Major Terrain Obstruction" 10.4 KM from the proposed transmitter site. Commission Staffs calculations conclude that it would take a tower 173 meters above the ground to overcome this obstruction.

¹ The **East** Kentucky proposed allocation reference is: North Latitude 37 23 57 and **West** Longitude 82 23 42.

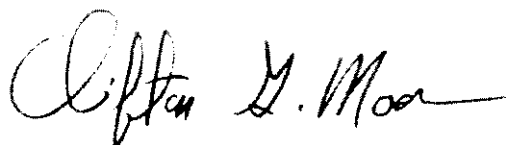
Now, we examine a point on what is thought to be the city limit of Coal Run². Even with a tower 401.4 meters tall (1316.9 feet) this portion of Coal Run does not have line of sight coverage from the East Kentucky allocation reference utilizing this massive tower. The attached exhibit shows that no line of sight is available to this location in Coal Run.

Yes, there are portions in Coal Run that will not receive the requisite 70 dBu, line of sight signal from the East Kentucky allocation reference location. But still the lingering fact of a tower structure that is not feasible remains. The last tower height examined featured a center of radiation above mean sea level of 950 meters. With the allocation reference site ground elevation of 548.6 meters (1800 feet) the tower height would have to be 401.4 meters above ground level. With the Commission's staff declaring in the Report and Order that a 173 meter tower not feasible, certainly a supporting structure of 401.4 meters would also be not feasible.

Based in part on the fact that the East Kentucky proposal to add Channel 221 C3 to Coal Run Kentucky and substitute Channel 276 A for Channel 221 A at Clinchco, Virginia was denied because the proposal required a tower structure that was not feasible, this instant Opposition to the Petition For Reconsideration continues opposition based on the new demonstration that the requisite supporting structure continues to be not feasible. Even a structure of 104.1 meters does not clearly serve (without shadows) the City of Coal Run.

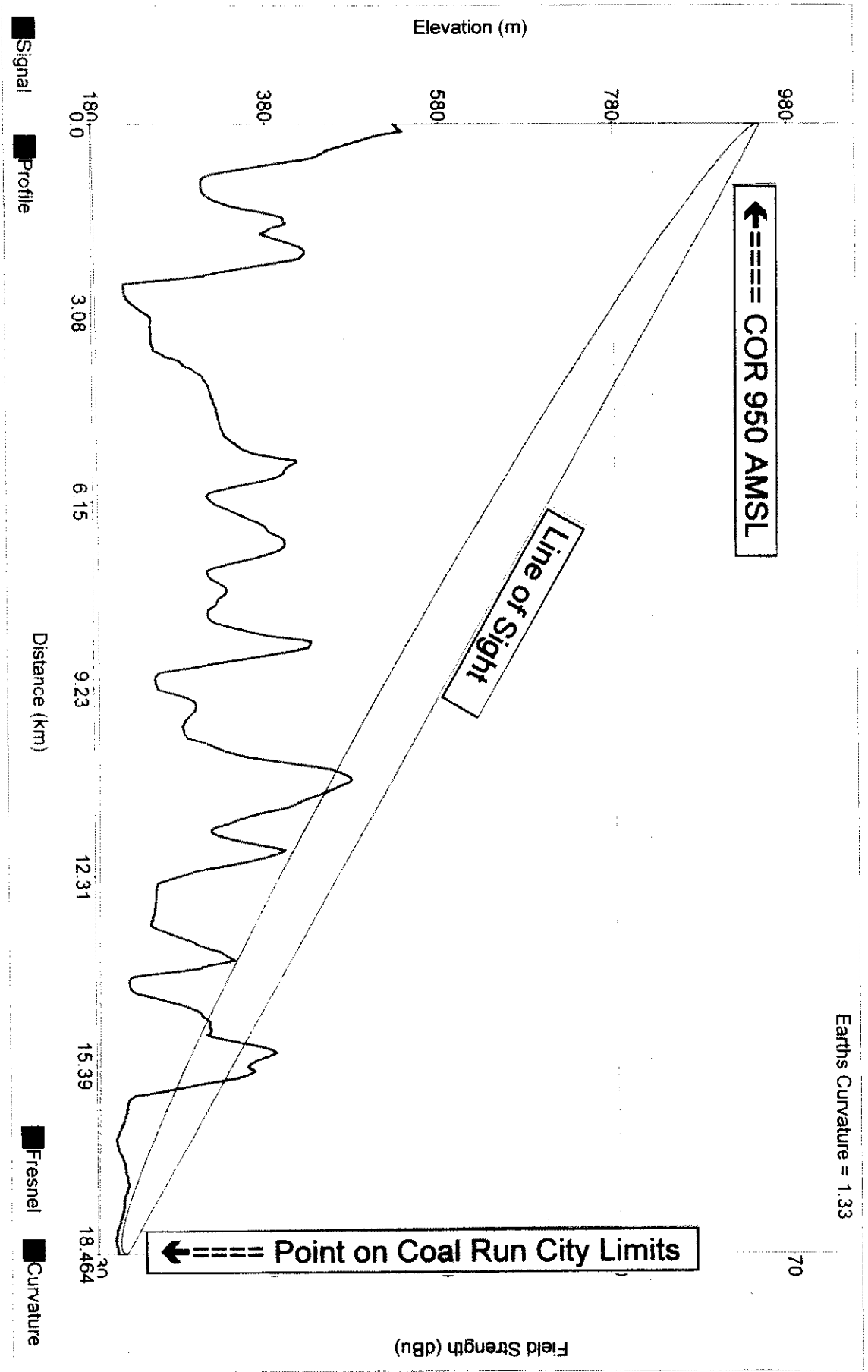
² Point on the Coal Run City Limits: North Latitude 37 30 38 and **West** Longitude 82 33 00.

Continuing the Commission rationale found in the Report and Order, this extremely tall structure would clearly be not feasible. Based on these findings, it is the opinion of Dickenson County Broadcasting Corp. that the Petition for Reconsideration regarding MB Docket No. 04-319 should be denied.

A handwritten signature in black ink, reading "Clifton G. Moor". The signature is written in a cursive, flowing style. The first name "Clifton" is written with a large, looped 'C'. The last name "Moor" is written with a large, looped 'M' and a trailing flourish.

Clifton G. Moor
Bromo Communications, Inc.
Technical Consultant to
Dickenson County Broadcasting Corp.

Point on Coal Run City Limits



Earth's Curvature = 1.33

Starting Latitude: 37-23-57 N
Starting Longitude: 082-23-42 W
Transmitter Height (AG) = 422.1 m
Receiver Height (AG) = 10.0 m

End Latitude: 37-30-37.62 N
End Longitude: 082-33-00.43 W
Transmitter Elevation = 527.9 m
Receiver Elevation = 201.9 m

Distance: 18.463897291 km
Bearing: 312.03 deg
Frequency = 92.1 MHz
Fresnel Zone: 0.6

FCC Letter Dated December 18,2003

FEDERAL COMMUNICATIONS COMMISSION

445 12th Street SW
WASHINGTON DC 20554

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AUDIO DIVISION
TECHNICAL PROCESSING GROUP
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December 18, 2003

Mr. Gary S. Smithwick
5028 Wisconsin Avenue NW, Suite 301
Washington, D.C. 20016

Mr. John F. Garziglia
Womble Carlisle Sandridge & Rice, PLLC
1401 I Street NW, 7th Floor
Washington, D.C. 20005

In re: WDIC-FM, Clinchco, VA
Dickenson County Broadcasng Corp
Facility ID No. 16905
CP Application BPH-

Dear Mr. Smithwick and Mr. Garziglia:

The referenced application filed by Dickenson County Broadcasng Corp. ("Dickenson") seeks a one-step upgrade from Class A to Class C3 for WDIC-FM, Clinchco, VA. The proposed Class C3 allotment reference site is located at a different site than the location from which WDIC-FM intends to broadcast. East Kentucky Broadcasting Corp. ("East Kentucky"), licensee of WPKE-FM, Elkhorn City and WDLR (AM), Pikesville, KY, has filed an informal objection seeking denial of this application.

East Kentucky states that a major terrain obstruction exists between the proposed Class C3 ~~allotment~~ reference site and Clinchco. Even with a tower height of 1,000 feet above ground level, the ~~terrain~~ obstruction would still be in excess of 200 meters above the line-of-sight between transmitter site and community of license. East Kentucky cites two allotment cases (*Creswell, Oregon*, 4 FCC Rcd 7040 (1989); *Jefferson City, Cumberland Gap, Elizabethton, TN and Jonesville, VA*, 13 FCC Rcd 2303 (1998)) in which the Commission denied proposals for new allotments due to the presence of terrain obstructions. In light of these precedents, East Kentucky contends that the proposed allotment site fails to meet the Commission's FM allotment standards and must be denied.

In reply, Dickenson states that the Commission **uses** uniform ~~terrain~~ when considering new or modified FM allotments.¹ Dickenson faults East Kentucky's construction of *Jefferson City, Cumberland Gap, Elizabethton, TN and Jonesville, VA*, 13 FCC Rcd 2303 (1998), arguing that **this** case did not involve a one-step upgrade allotment site. Dickenson contends that the terrain issue is irrelevant inasmuch as the site is hypothetical only and Dickenson does not intend operations from that location. The proposed allotment reference site is said to be the only one at which the spacing requirements of 47 CFR Section 73.207 **are** fully met. Dickenson believes it has amply demonstrated circumstances that (in the event it is necessary) warrants waiver of Section 73.315(a).

Analysis. An essential part of the making of any allotment, **be** it through the rulemaking process or by a one-step upgrade application, is full coverage of the community of license by the 70 dBu service contour. In *FM Channel and Class Modifications by Application*, 8 FCC Rcd 4735 (1993), which adopted the one-step upgrade procedure, the Commission required that

¹ Dickenson cites to *Caldwell, College Station and Gause, Texas*, 15 FCC Rcd at 3322 and 3325.

an applicant must include a separate exhibit to the application which shows that the allotment reference site would meet allotment standards with respect to spacing and **city** grade coverage and that it would be suitable for tower construction. ... Generally **speaking**, examples of unsuitable allotment reference sites include those which are offshore, in a national or state park in which tower construction is prohibited, on an airport, or otherwise in an area which would necessarily present a hazard to **air** navigation.

8 FCC Rcd at 4737, note 10. While Dickenson **is** correct that the Commission generally considers proposed allotment sites without reference to terrain (i.e., assumes flat or uniform terrain), terrain obstacles can **be** considered where the obstacle would affect coverage of the community of license. *Cresswell, Oregon, supra*; *Jefferson City, Cumberland Gap, Elizabethton, TN and Jonesville, VA, supra*.² In **such** cases, the proponent may submit a showing to demonstrate that a site is, in fact, suitable for tower construction.

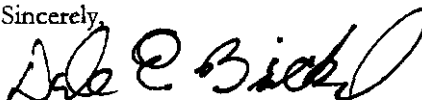
As stated in *Crestview and Westbay, Florida*, 7 FCC Rcd 3059 (1992):

The underlying requirement for an allotment is the reasonable expectation that a **useable** site **is** available in compliance with the minimum spacing requirements. We will not allot a channel where a properly spaced site is technically infeasible. Although the Commission generally presumes in rule making proceedings that a technically feasible site is available, that presumption is rebuttable. See *Sun Clemente, California*, 3 FCC Rcd 6728 (1988), *appeal denied sub nom. Mount Wilson FM Broadcasters, Inc. v. FCC*, 884 F.2d 1462 (D.C. Cir. 1989).³

Here, Dickenson has not submitted any information that would lead us to believe that the proposed allotment reference site could feasibly be used for an operation which could cover the community of license with a 70 dBu signal. **We** have no information suggesting that the FAA could approve a tower of sufficient height to clear the terrain obstruction. Nor has Dickenson cited any allotment case where an allotment was made despite the presence of a large intervening terrain obstruction. Finally, Dickenson has provided no information to show that any of the community of license would receive a 70 dBu **signal** when the terrain obstruction is considered. Consequently, the proposal is unacceptable for filing, and no waiver of Section 73.315(a) is warranted.

When an applicant seeks waiver of the **rules**, it must plead with particularity the facts and circumstances which warrant such action. *Columbia Communications Corp v. FCC*, 832 F.2d 189, 192 (D.C. Cir. 1987) (quoting *Rio Grande Family Radio Fellowship v. FCC*, 406 F.2d 644, 666 (D.C. Cir. 1968) (per curiam)). We have afforded Dickenson's waiver request the "hard look" called for under *WALT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), but find that the facts and circumstances **set** forth in Dickenson's justification are insufficient to establish that granting waiver of Section 315(a) **is** in the public interest. Consequently, East Kentucky's informal objection **IS GRANTED**. Dickenson's request for waiver of Section 73.315(a) **IS DENIED**, and application BPH-20010502AAN, being unacceptable for filing, **IS DISMISSED**. This action is taken pursuant to 0.283.

Sincerely,



Dale E. Bickel
Senior Electronics Engineer
Audio Division
Media Bureau

cc: Dickenson County Broadcasting Corp.

² See also *Bald Knob and Clarendon, AR*, MM Docket 90-651, 6 FCC Rcd 7435 (1991); *Elkins, WV, Mountain Lake Park and Westernport, MD*, 7 FCC Rcd 5527, 5530 (1992).

³ See also *West Palm Beach, Florida*, MM Docket 87-438, DA-91-1421, 6 FCC Rcd 6975, 6976 ("we will ... take into account a showing by a party **that, in** reality, no theoretical sites exist because of environmental, **air** hazard, or other similar considerations").

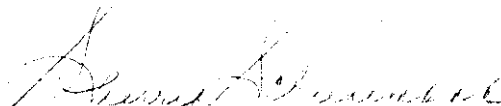
CERTIFICATE OF SERVICE

I, Sherry Schunemann certify that on May 17, 2007, copies of the foregoing Opposition to Petition for Reconsideration were sent via first class mail (or hand delivered, as marked with an asterisk), postage pre-paid, to the following:

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Peter Gutmann, Esq.
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1401 Eye Street, NW, Suite 700
Washington, DC 20005
(Counsel for East Kentucky)

* By hand


Sherry Schunemann